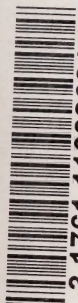


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Ethical Principles for Judges



CANADIAN JUDICIAL COUNCIL



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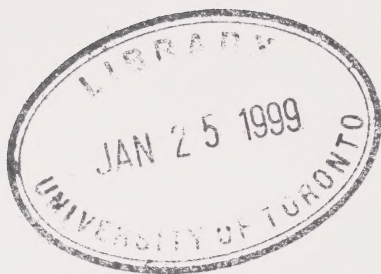
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Ethical Principles for Judges







© Canadian Judicial Council
Catalogue Number JU11-4/1998E
ISBN 0-662-27376-1

Available from:
Canadian Judicial Council
Ottawa, Ontario
K1A 0W8
(613) 998-5182
(613) 998-8889 (facsimile)
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BAF-6437

Foreword

We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation...

— Gerald Gall, *The Canadian Legal System*

The publication of *Ethical Principles for Judges* is the latest in a series of steps to assist judges in carrying out their onerous responsibilities. It represents a concise yet comprehensive set of principles addressing the many difficult ethical issues that confront judges as they work and live in their communities. It also provides a sound basis to promote a more complete understanding of the role of the judge in society and of the ethical dilemmas they so often encounter.

This document is the result of work launched in earnest by a decision of the Canadian Judicial Council in September 1994. The project was led by a Working Committee consisting of four Council members, Chief Justice Richard J. Scott of Manitoba (Chair), Chief Justice Allan McEachern of British Columbia, Chief Justice R. Roy McMurtry of Ontario, Chief Justice Pierre Michaud of Quebec, together with Madam Justice Elizabeth McFadyen of the Alberta Court of Appeal (representing the Canadian Judges Conference), (then) Professor (now Mr. Justice) Thomas Cromwell of the Nova Scotia Court of Appeal, and the Council's Executive Director, Ms. Jeannie Thomas. I wish to acknowledge especially the enormous contribution of the Chair of the Working Committee, Chief Justice Scott, whose leadership and devotion inspired everyone involved. I should also like to thank Mr. Justice Cromwell, who "held the pen" throughout most of the drafting process, for the important contribution he made to the document.

This document has been the subject of widespread consultation both within and outside the judiciary. Members of the Working Committee held more than 50 meetings and conference calls, met with the judges of many courts across the country, and organized a special judicial seminar on the subject. Additional input from the Canadian Bar Association, the Federation of Law Societies of Canada, the Canadian Association of Provincial Court Judges, the

academic community and Deputy Attorneys General proved invaluable to the Committee. Indeed, this project could not have succeeded without the dedicated work by the many persons who offered detailed comments on numerous drafts over nearly four years.

Endorsed by the Canadian Judicial Council and drafted with the cooperation of the Canadian Judges Conference, *Ethical Principles for Judges* fulfils a long-standing goal to formulate a statement of judicial ethics for the benefit of judges and the public. I am confident these *Principles* will prove their value for many years to come.

The Right Honourable Antonio Lamer, P.C.
Chief Justice of Canada
Chairman, Canadian Judicial Council

November 1998



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1. Purpose

STATEMENT: *The purpose of this document is to provide ethical guidance for federally appointed judges.*

PRINCIPLES:

1. The Statements, Principles and Commentaries describe the very high standards toward which all judges strive. They are principles of reason to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. Setting out the very best in these Statements, Principles and Commentaries does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval.
2. The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.
3. An independent judiciary is the right of every Canadian. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. Nothing in these Statements, Principles and Commentaries can, or is intended to limit or restrict judicial independence in any manner. To do so would be to deny the very thing this document seeks to further: the rights of everyone to equal and impartial justice administered by fair and independent judges. As indicated in the chapter on Judicial Independence, judges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judges.

COMMENTARY:

1. These Statements, Principles and Commentaries are the latest in a series of Canadian efforts to provide guidance to judges on ethical and professional questions and to better inform the public about the high ideals which judges embrace and toward which they strive. They build upon the earlier work of the Hon. J.O. Wilson in *A Book for Judges* published in 1980, the Rt. Hon. Gerald Fauteux in *Le livre du magistrat* also published in 1980, the Canadian Judicial Council's *Commentaries on Judicial Conduct* published in 1991 and Professor Beverley Smith's text, *Professional Conduct for Lawyers and Judges* (1998). While drawing heavily on these invaluable resources, the present publication is by far the most comprehensive treatment of the subject to date in Canada. But it cannot provide exhaustive coverage of the myriad issues that arise in practice. The sources just mentioned, as well as those referred to in the next Commentary, will continue to be of assistance to Canadian judges.

2. As the references throughout the text indicate, a wide variety of sources have been consulted in the process of preparing this document. These include not only Canadian sources but also the Code of Judicial Conduct applying to the United States Federal judiciary, the American Bar Association's *Model Code of Judicial Conduct* (1990) as well as scholarly writing and rulings concerning judicial conduct in Canada, the United Kingdom, Australia and the United States. Of particular note are J.B. Thomas, *Judicial Ethics in Australia* (2d, 1997), J. Shaman et al, *Judicial Conduct and Ethics* (2d, 1995) and S. Shetreet, *Judges on Trial* (1976). While all of these sources are helpful, this document is uniquely the work of Canadian judges. The process which resulted in these Statements, Principles and Commentaries was carried forward by a Working Committee representative of both the Canadian Judicial Council and the Canadian Judges Conference. An extensive process of consultation within the judiciary and beyond ensured that these Statements, Principles and Commentaries have been the subject of painstaking examination and vigorous debate. The intention is that Canadian judges will accept these Statements, Principles and Commentaries as reflective of their high ethical aspirations and that they will find them worthy of respect and deserving of careful consideration when facing any of the issues addressed in them.

3. A document of this nature can never be viewed as the “final word” on such an important and complex subject. Publication of these Statements, Principles and Commentaries coincides with the establishment of an Advisory Committee of Judges to which specific questions may be submitted by judges and which will respond with advisory opinions. This process will contribute to ongoing review and elaboration of the subjects dealt with in the Principles as well as introduce new issues that they do not address. More importantly, the Advisory Committee will ensure that help is readily available to judges looking for guidance.



2. Judicial Independence

STATEMENT: *An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.*

PRINCIPLES:

1. Judges must exercise their judicial functions independently and free of extraneous influence.
2. Judges must firmly reject any attempt to influence their decisions in any matter before the Court outside the proper process of the Court.
3. Judges should encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the judiciary.
4. Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence.

COMMENTARY:

1. Judicial independence is not the private right of judges but the foundation of judicial impartiality and a constitutional right of all Canadians. Independence of the judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision making.¹ Judicial independence thus characterizes both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence and impartiality. The Statement and Principles deal with judges' ethical obligations as regards their individual and collective independence. They do not deal with the many legal issues relating to judicial independence.
2. In *Valente v. The Queen*, LeDain, J. noted that "...judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government."² He concluded that "...judicial independence is a status or relationship resting on objective conditions or guarantees as well as a state of mind or attitude in the actual exercise of judicial functions...."³ The objective conditions and guarantees include, for example, security of tenure, security of remuneration and immunity from civil liability for judicial acts.
3. The first qualification of a judge is the ability to make independent and impartial decisions. The subject of judicial impartiality is treated in detail in chapter 6. However, judicial independence is not only a matter of appropriate external and operational arrangements. It is also a matter of independent and impartial decision making by each and every judge. The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is

¹ S. Shetreet, *Judges on Trial*, (1976) (hereafter "*Shetreet*") at 17.

² [1985] 2 S.C.R. 673 at 687.

³ *Ibid.* at 689.

popular or not. This is a cornerstone of the rule of law. Judges individually and collectively should protect, encourage and defend judicial independence.

4. Judges must, of course, reject improper attempts by litigants, politicians, officials or others to influence their decisions. They must also take care that communications with such persons that judges may initiate could not raise reasonable concerns about their independence. As the Honourable J.O. Wilson put it in *A Book for Judges*:

It may be safely assumed that every judge will know that [attempts to influence a court] must only be made publicly in a court room by advocates or litigants. But experience has shown that other persons are unaware of or deliberately disregard this elementary rule, and it is likely that any judge will, in the course of time, be subjected to ex parte efforts by litigants or others to influence his decisions in matters under litigation before him.

...

Regardless of the source, ministerial, journalistic or other, all such efforts must, of course, be firmly rejected. This rule is so elementary that it requires no further exposition.⁴

5. Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence. As Professor Nolan points out, judicial independence and judicial ethics have a symbiotic relationship.⁵ Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

⁴ J.O. Wilson, *A Book for Judges* (1980) (hereafter "Wilson") at 54-55.

⁵ B. Nolan, "The Role of Judicial Ethics in the Discipline and Removal of Federal Judges," in *Research Papers of the National Commission on Judicial Discipline & Removal Volume I* (1993), pp. 867-912, at 874.

[O]nly by maintaining high standards of conduct will the judiciary (1) continue to warrant the public confidence on which deference to judicial rulings depends, and (2) be able to exercise its own independence in its judgments and rulings.⁶

In short, judges should demonstrate and promote high standards of judicial conduct as one element of assuring the independence of the judiciary.

6. Judges should be vigilant with respect to any attempts to undermine their institutional or operational independence. While care must be taken not to risk trivializing judicial independence by invoking it indiscriminately in opposition to every proposed change in the institutional arrangements affecting the judiciary, judges should be staunch defenders of their own independence. Although the form and nature of the defence must be carefully considered, the propriety in principle of such defence cannot be questioned.⁷
7. Judges should also recognize that not everyone is familiar with these concepts and their impact on judicial responsibilities. Public education with respect to the judiciary and judicial independence thus becomes an important function, for misunderstanding can undermine public confidence in the judiciary. There is, for example, a danger of misperception about the nature of the relationship between the judiciary and the executive, particularly given the Attorney General's dual roles as the cabinet minister responsible for the administration of justice and as the government's lawyer. The public may not get a completely balanced view of the principle of judicial independence from the media which may portray it incorrectly as protecting judges from review of and public debate concerning their actions. Judges, therefore, should take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence, in view of the public's own interest.⁸

⁶ *Ibid.* at 875.

These issues are addressed further in chapter 6, *infra*.

⁸ The phrase "appropriate opportunities" should remind judges that the circumstances of such public interventions must be considered carefully given the constraints of the judicial role. Some of the relevant considerations are discussed more fully in chapter 6, "Impartiality"; see also, for example, J.B. Thomas, *Judicial Ethics in Australia* (2d, 1997) (hereafter "*Thomas*") at 106-111.

8. Judges are asked frequently to serve as inquiry commissioners. In considering such a request, a judge should think carefully about the implications for judicial independence of accepting the appointment. There are examples of Judicial Commissioners becoming embroiled in public controversy and being criticized and embarrassed by the very governments which appointed them. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.⁹ The Position of the Canadian Judicial Council on the Appointment of Federally Appointed Judges to Commissions of Inquiry, approved in March 1998, provides useful guidance in this area.

⁹ It is interesting to note that the Australian High Court has ruled that, on separation of powers grounds, there are strict limits in law on the nature of commissions to which judges may be appointed: *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 A.L.J.R. 743; *Kable v. D.P.P.* (1996) 70 A.L.J.R. 814; see also R. MacGregor Dawson, *The Government of Canada* (3d) at 482: "There would seem to be little purpose in taking elaborate care to separate the judge from politics and to render him quite independent of the executive, and then placing him in a position as a Royal Commissioner where his impartiality may be attacked and his findings — no matter how correct and judicial they may be — are liable to be interpreted as favouring one political party at the expense of the other. For many of the inquiries or boards place the judge in a position where he cannot escape controversy: ...It has been proved time and again that in many of these cases the judge loses in dignity and reputation, and his future is appreciably lessened thereby. Moreover, if the judge remains away from his regular duties for very long periods, he is apt to lose his sense of balance and detachment; and he finds that the task of getting back to normal and of adjusting his outlook and habits of mind to purely judicial work is by no means easy."



3. Integrity

STATEMENT: *Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.*

PRINCIPLES:

1. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.
2. Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

COMMENTARY:

1. Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment. The Canadian judiciary has a strong and honourable tradition in this area which serves as a sound foundation for appropriate judicial conduct.
2. While the ideal of integrity is easy to state in general terms, it is much more difficult and perhaps even unwise to be more specific. There can be few absolutes since the effect of conduct on the perception of the community depends on community standards that may vary according to place and time.
3. As one commentator put it, the key issue about a judge's conduct must be how it "...reflects upon the central components of the judge's ability to do the job."¹⁰ This requires consideration of first, how particular conduct would be perceived by reasonable, fair minded and informed members of the community and second, whether that perception is likely to lessen respect for the judge or the judiciary as a whole. If conduct is likely to diminish respect in the minds of such persons, the conduct should be avoided. As Shaman put it, "...the ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office."¹¹ The judge should exhibit respect for the law, integrity in his or her private dealings and generally avoid the appearance of impropriety.

¹⁰ J. Shaman et al., *Judicial Conduct and Ethics* (2d, 1995) (hereafter "*Shaman*") at 335.

¹¹ *Ibid.* at 312.

4. Judges, of course, have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. Moreover, an out of touch judge is less likely to be effective. Neither the judge's personal development nor the public interest is well served if judges are unduly isolated from the communities they serve. Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in light of common sense and experience. Therefore, judges should, to the extent consistent with their special role, remain closely in touch with the public. These issues are discussed more fully in the "Impartiality" chapter, particularly section C thereof.
5. A judge's conduct, both in and out of court, is bound to be the subject of public scrutiny and comment. Judges must therefore accept some restrictions on their activities — even activities that would not elicit adverse notice if carried out by other members of the community. Judges need to strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family.
6. In addition to judges' observing high standards of conduct personally they should also encourage and support their judicial colleagues to do the same as questionable conduct by one judge reflects on the judiciary as a whole.
7. Judges also have opportunities to be aware of the conduct of their judicial colleagues. If a judge is aware of evidence which, in the judge's view, is reliable and indicates a strong likelihood of unprofessional conduct by another judge, serious consideration should be given as to how best to ensure that appropriate action is taken having regard to the public interest in the due administration of justice. This may involve counselling, making inquiries of colleagues, or informing the chief justice or associate chief justice of the court.



4. Diligence

STATEMENT: *Judges should be diligent in the performance of their judicial duties.*

PRINCIPLES:

1. Judges should devote their professional activity to judicial duties broadly defined, which include not only presiding in court and making decisions, but other judicial tasks essential to the court's operation.
2. Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.
3. Judges should endeavour to perform all judicial duties, including the delivery of reserved judgments, with reasonable promptness.
4. Judges should not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

COMMENTARY:

1. Socrates counselled judges to hear courteously, answer wisely, consider soberly and to decide impartially. These judicial virtues are all aspects of judicial diligence. It is appropriate to add to Socrates' list the virtue of acting expeditiously, but diligence is not primarily concerned with expedition. Diligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.
2. Section 55 of the *Judges Act* (which applies to federally appointed judges) provides that judges must devote themselves to judicial duties.¹² Subject to the limitations imposed by the *Judges Act* and the judicial role, judges are free to participate in other activities that do not detract from the performance of judicial duties. In short, the work of the judge's court comes first.
3. While judges should exhibit diligence in the performance of their judicial duties, their ability to do so will depend on the burden of work, the adequacy of resources including staff, technical assistance and time for research, deliberation, writing and other judicial duties apart from sitting in court. The importance of the judge's responsibility to his or her family is also recognized. Judges should have sufficient vacation and leisure time to permit the maintenance of physical and mental wellness and reasonable opportunities to enhance the skill and knowledge necessary for effective judging.
4. As mentioned in Commentary 8 of the "Judicial Independence" chapter, judges are sometimes called upon by governments to undertake tasks which take them away from the regular work of their courts. Service on royal commissions of inquiry is one example. A judge should not accept such an appointment without consulting with his or her chief justice to ensure that acceptance of the appointment will not unduly interfere with the effective functioning of the court or unduly burden its other members. The position of the Canadian Judicial Council,

¹² *Judges Act*, R.S.C. 1985, c.J-1, s.55. The text of the section is as follows:

55. No judge shall, either directly or indirectly, for himself or others, engage in any occupation or business other than his judicial duties, but every judge shall devote himself exclusively to those judicial duties.

approved at its March 1998 mid-year meeting, provides useful guidance in this area.

5. As long ago as *Magna Carta*, it was recognized that judges should have a good knowledge of the law.¹³ This knowledge extends not only to substantive and procedural law, but to the real life impact of law. As one scholar put it, law is not just what it says; law is what it does.¹⁴ Sustained efforts to maintain and enhance the knowledge, skills and attitudes necessary for effective judging are important elements of judicial diligence. This involves participation in continuing education programs as well as private study.¹⁵
6. It is useful to consider the subject of judicial diligence under three headings: Adjudicative Duties, Administrative and Other Out of Court Duties, and Contributions to the Administration of Justice Generally.

Adjudicative Duties

7. Diligence in the performance of adjudicative duties includes striving for impartial and even-handed application of the law, thoroughness, decisiveness, promptness and the prevention of abuse of the process and improper treatment of witnesses. While these are all qualities and skills a judge needs, the variety of cases and the particular conduct of counsel and parties require a judge conducting a hearing to emphasize one or more, sometimes at the expense of some of the others, in order to achieve the proper balance. Striking this balance may be particularly challenging when one party is represented by a lawyer and another is not. While doing whatever is possible to prevent unfair disadvantage to the unrepresented party, the judge must be careful to preserve his or her impartiality.

¹³ The reference is to Article 45 of *Magna Carta*: "We will not make any justices, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it" as quoted in D.K. Carrol, *Handbook for Judges* (1961) at 29.

¹⁴ R.A. Samek, "A Case for Social Law Reform" (1977), 55 Can. Bar Rev. 409 at 411.

¹⁵ See for example, Canadian Bar Foundation, *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada* (1985) at 36: "Competence in the discharge of judicial duties is an important factor in the public's support of an independent judiciary."; see generally, M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995) at 167 ff.; see also chapter 5, "Equality"; the current goal recommended by the National Judicial Institute is a minimum of 10 days of continuing education per year for each judge although workload does not always allow this goal to be achieved.

8. The obligation to be patient and treat all before the court with courtesy does not relieve the judge of the equally important duty to be decisive and prompt in the disposition of judicial business. The ultimate test of whether the judge has successfully combined these ingredients into the conduct of the matters before the court is whether the matter has not only been dealt with fairly but in a fashion that is seen to be fair.¹⁶ These issues are addressed in the "Impartiality" chapter, section B.
9. Generally speaking, a judge should perform all properly assigned judicial duties, be punctual unless other judicial duties prevent it and be reasonably available to perform all assigned duties.
10. The proper preparation of judgments is frequently difficult and time consuming. However, the decision and reasons should be produced by the judge as soon as reasonably possible, having due regard to the urgency of the matter and other special circumstances. Special circumstances may include illness, the length or complexity of the case, an unusually heavy workload or other factors making it impossible to give judgment sooner. In 1985, the Canadian Judicial Council resolved that, in its view, reserved judgments should be delivered within six months after hearings, except in special circumstances.¹⁷
11. It is, of course, often necessary for judges to make findings of credibility and to rule on the propriety of others' conduct. However, judges should avoid making comments about persons who are not before the court unless it is necessary for the proper disposition of the case. For example, irrelevant or otherwise unnecessary comments in judgments about a person's conduct or motives ought to be avoided.¹⁸

¹⁶ See *Brouillard v. The Queen*, [1985] 1 S.C.R. 39 per Lamer, J. (as he then was) for the court at 48: "...although the judge may and must intervene for justice to be done, he must none the less do so in such a way that justice is seen to be done." (emphasis in original). The court also cited with approval the discussion of this subject in G. Fauteux, *Le livre du magistrat* (1980) (hereafter "*Livre*").

¹⁷ Canadian Judicial Council Resolution September 1985; Legislation and Rules of Court may establish times within which judgment is to be given: see for example *Code of Civil Procedure* (Qc), article 465; repeated inability to give timely judgment has been the basis of a number of complaints to the Canadian Judicial Council: see Canadian Judicial Council, *Annual Report 1992-93* at 14.

¹⁸ See *Commentaries on Judicial Conduct* (1991) (hereafter "*Commentaries*") at 82-83; *Shetreet* at 294-5.

Administrative and Other Out of Court Duties

12. Today, judicial duties include administrative and other out of court activities. Judges have important responsibilities, for example, in case management and pre-trial conferences as well as on committees of the court. These are all judicial duties and should be undertaken with diligence.

Contributions to the Administration of Justice Generally

13. Judges are uniquely placed to make a variety of contributions to the administration of justice. Judges, to the extent that time permits and subject to the limitations imposed by judicial office, may contribute to the administration of justice by, for example, taking part in continuing legal education programs for lawyers and judges and in activities to make the law and the legal process more understandable and accessible to the public. These activities are discussed in the "Impartiality" chapter, particularly sections B and C.
14. It is a delicate question whether and in what circumstances a judge should report, or cause to be reported, a lawyer to the lawyer's professional governing body. Taking such action may affect the ability of the judge to continue in the proceeding in which that lawyer is appearing, given that the judge's view of the lawyer's conduct may give rise to a reasonable apprehension of bias against the lawyer or the lawyer's client. On the other hand, a judge is in a special position to observe lawyers' conduct before the court. Putting aside any issue of contempt, generally a judge should take, or cause to be taken, appropriate action where the judge has clear and reliable evidence of serious misconduct or gross incompetence by a lawyer. The judge will have to weigh carefully whether the interests of justice require that he or she wait until the end of the proceeding or whether there are circumstances which require earlier action even though the judge, nonetheless, continues to preside.



5. Equality

STATEMENT: *Judges should conduct themselves and proceedings before them so as to assure equality according to law.*

PRINCIPLES:

1. Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination.
2. Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.
3. Judges should avoid membership in any organization that they know currently practices any form of discrimination that contravenes the law.
4. Judges, in the course of proceedings before them, should disassociate themselves from and disapprove of clearly irrelevant comments or conduct by court staff, counsel or any other person subject to the judge's direction which are sexist, racist or otherwise demonstrate discrimination on grounds prohibited by law.

COMMENTARY:

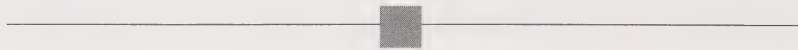
1. The Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection and benefit of the law without discrimination. This is not a commitment to identical treatment but rather "...to the equal worth and human dignity of all persons" and "...a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society."¹⁹ Moreover, Canadian law recognizes that discrimination is concerned not only with intent, but with effects.²⁰ Quite apart from explicit constitutional and statutory guarantees, fair and equal treatment has long been regarded as an essential attribute of justice. While its demands in particular situations are sometimes far from self evident, the law's strong societal commitment places concern for equality at the core of justice according to law.
2. Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived.
3. Judges should not be influenced by attitudes based on stereotype, myth or prejudice. They should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes.
4. As is discussed in more detail in the "Impartiality" chapter, judges should strive to ensure that their conduct is such that any reasonable, fair minded and informed member of the public would justifiably have confidence in the impartiality of the judge. Judges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone. Examples include irrelevant comments based on racial, cultural, sexual or other stereotypes and other conduct implying that persons before the court will not be afforded equal consideration and respect.

¹⁹ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 per LaForest, J. for the court at 667.

²⁰ *Ibid.* at 670-671.

Inappropriate conduct may arise from a judge being unfamiliar with cultural, racial or other traditions or failing to realize that certain conduct is hurtful to others. Judges therefore should attempt by appropriate means to remain informed about changing attitudes and values and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist them to be and appear to be impartial. In doing this, however, it is also necessary to take care that these efforts enhance and do not detract from judges' perceived impartiality. All forms or vehicles of education are not necessarily appropriate for judges given the demands of independence and impartiality. Care must be taken that exaggerated or unfounded concern in this regard does not undermine efforts to enhance good judging.

Principle 4 deals with the role of the presiding judge in addressing clearly irrelevant comments which are sexist or racist or other such inappropriate conduct in proceedings before them. This does not require that proper advocacy or admissible testimony be curtailed where, for example, matters of gender, race or other similar factors are properly before the court. This advice is consistent with the judge's general duty to listen fairly but, when necessary, to assert firm control over the proceeding and to act with appropriate firmness to maintain an atmosphere of dignity, equality and order in the courtroom. Principle 4 certainly does not counsel perfection. Further, applying it may sometimes be a formidable challenge for the judge. The adversarial system gives the parties and their counsel considerable leeway and the relevance and importance of evidence may be difficult to assess accurately as it is being presented. The judge should always do her or his best to strike the right balance. The fact that, when reconsidered later with the benefit of hindsight and the opportunity for further reflection, the situation might have been handled differently is not, of itself, any indication that the judge failed to deal with inappropriate conduct during the proceeding.



6. Impartiality

STATEMENT: *Judges must be and should appear to be impartial with respect to their decisions and decision making.*

PRINCIPLES:

A. General

1. Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.
2. Judges should as much as reasonably possible conduct their personal and business affairs so as to minimize the occasions on which it will be necessary to be disqualified from hearing cases.
3. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.

B. Judicial Demeanour

1. While acting decisively, maintaining firm control of the process and ensuring expedition, judges should treat everyone before the court with appropriate courtesy.

C. Civic and Charitable Activity

1. Judges are free to participate in civic, charitable and religious activities subject to the following considerations:
 - (a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.

- (b) Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations.
- (c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation.
- (d) Judges should not give legal or investment advice.

D. Political Activity

1. Judges should refrain from conduct such as membership in groups or organizations or participation in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts.
2. All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity.
3. Judges should refrain from:
 - (a) membership in political parties and political fund raising;
 - (b) attendance at political gatherings and political fund raising events;
 - (c) contributing to political parties or campaigns;
 - (d) taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice;
 - (e) signing petitions to influence a political decision.

4. Although members of a judge's family have every right to be politically active, judges should recognize that such activities of close family members may, even if erroneously, adversely affect the public perception of a judge's impartiality. In any case before the court in which there could reasonably be such a perception, the judge should not sit.

E. Conflicts of Interest

1. Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.
2. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.
3. Disqualification is not appropriate if: (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification, or (b) no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice.

COMMENTARY:

A. General

A.1 From at least the time of John Locke in the late seventeenth century, adjudication by impartial and independent judges has been recognized as an essential component of our society.²¹ Impartiality is the fundamental qualification of a judge and the core attribute of the judiciary. The Statement and Principles do not and are not intended to deal with the law relating to judicial disqualification or recusation.

A.2 While judicial impartiality and independence are distinct concepts, they are closely related. This relationship was explored recently by Gonthier, J. on behalf of the majority of the Supreme Court of Canada in *Ruffo v. Conseil de la Magistrature*.²² The court noted that the right to be tried by an independent and impartial tribunal is an integral part of the principles of fundamental justice protected by s.7 of the Canadian *Charter*²³ and reaffirmed the following statement by Le Dain, J. in *R. v. Valente*:

Although there is obviously a close relationship between independence and impartiality, they are never the less separate and distinct values and requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial"...connotes absence of bias, actual or perceived

...

Both independence and impartiality are fundamental, not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a

²¹ Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987) (hereafter "*Russell*").

²² [1995] 4 S.C.R. 267 at 296-299.

²³ *Ibid.*

tribunal should be perceived as independent, as well as impartial...²⁴

Lamer C.J.C. put it this way in *R. v. Lippé*:

The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a “means” to this “end.” If judges could be perceived as “impartial” without judicial “independence” the requirement of “independence” would be unnecessary. However, judicial independence is critical to the public’s perception of impartiality. Independence is the cornerstone, a necessary prerequisite for judicial impartiality.²⁵

A.3 Impartiality is not only concerned with perception, but more fundamentally with the actual absence of bias and prejudgment. This dual aspect of impartiality is captured in the often repeated words that justice must not only be done, but manifestly be seen to have been done. As de Grandpre, J. put it in *Committee for Justice and Liberty v. National Energy Board*,²⁶ the test is whether “an informed person, viewing the matter realistically and practically — and having thought the matter through —” would apprehend a lack of impartiality in the decision maker. Whether there is a reasonable apprehension of bias is to be assessed from the point of view of a reasonable, fair minded and informed person.

A.4 “True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.”²⁷ The judge’s fundamental obligation is to strive to be and to appear to be as impartial as is possible. This is not a counsel of perfection. Rather it underlines the fundamental nature of the obligation of impartiality which also extends to minimizing any reasonable apprehension of bias.

²⁴ [1985] 2 S.C.R. 673 at 685 and 689.

²⁵ [1991] 2 S.C.R. 114 at 139.

²⁶ [1978] 1 S.C.R. 369, most recently endorsed in *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484 *per* Cory, J. at 530 and *per* L’Heureux-Dubé and McLachlin, JJ. at 502.

²⁷ In *R.D.S. v. The Queen*, *supra*, note 26, at 504, L’Heureux-Dubé and McLachlin, JJ. (Gonthier and LaForest, JJ., concurring) cited this passage from page 12 of *Commentaries* with approval.

A.5 A reasonable perception that a judge lacks impartiality is damaging to the judge, the judiciary as a whole and the good administration of justice. Judges should, therefore, avoid deliberate use of words or conduct, in and out of court, that could reasonably give rise to a perception of an absence of impartiality.²⁸ Everything from his or her associations or business interests to remarks which the judge may consider to be “harmless banter,” may diminish the judge’s perceived impartiality.²⁹

A.6 The expectations of litigants may be very high. Some will be quick to perceive bias quite unjustifiably when a decision is not in their favour. Therefore every effort should be made to ensure that reasonable grounds for such a perception are avoided or minimized. On the other hand, judges have an obligation to treat all parties fairly and evenhandedly; those litigants who perceive bias where no reasonable, fair minded and informed person would find it are not entitled to different or special treatment for that reason. Moreover, as discussed below, the judge also has the obligation to ensure that proceedings are conducted in an orderly and efficient manner. This may well require an appropriate degree of firmness.

It is helpful to address the question of impartiality under more specific headings.

B. Judicial Demeanour

B.1 Litigants and others scrutinize judges very closely for any indication of unfairness. Unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudice and intemperate and impatient behaviour may destroy the appearance of impartiality. On the other hand, judges are obliged to ensure that proceedings are conducted in an orderly and efficient manner and that the court’s process is not abused. An appropriate measure of firmness is necessary to achieve this end. A fine balance is to be drawn by judges who are expected both to conduct the process effectively and avoid creating in the mind of a reasonable, fair minded and informed person any impression of a lack of impartiality. These issues are more fully discussed in chapters 4 and 5, “Diligence” and “Equality.” It bears repeating, however, that any action which, in the mind of a reasonable, fair minded and informed person who has considered the matter, would give rise

²⁸ American Bar Association, *Model Code of Judicial Conduct* (1990) (hereafter “ABA Model Code (1990)”), Commentary to Canon 3B.

²⁹ *Canadian Judicial Council Annual Report 1992-93* at 16.

to reasoned suspicion of a lack of impartiality must be avoided. When such impressions are created, they affect not only the litigants before the court but public confidence in the judiciary generally.³⁰

C. Civic and Charitable Activity

C.1 A judge is appointed to serve the public. Many persons appointed to the bench have been and wish to continue to be active in other forms of public service. This is good for the community and for the judge, but carries certain risks. For that reason, it is important to address the question of the limits that judicial appointment places upon the judge's community activities.

C.2 The judge administers the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments. The Right Honourable Gerald Fauteux put the matter succinctly and eloquently in *Le livre du magistrat*³¹ (translation):

[there is no intention] to place the judiciary in an ivory tower and to require it to cut off all relationship with organizations which serve society. Judges are not expected to live on the fringe of society of which they are an important part. To do so would be contrary to the effective exercise of judicial power which requires exactly the opposite approach.

C.3 The precise constraints under which judges should conduct themselves as regards civic and charitable activity are controversial inside and outside the judiciary. This is not surprising given that the question involves balancing competing considerations. On one hand, there are the beneficial aspects, both for the community and the judiciary, of the judge being active in other forms of public service. This needs to be assessed in light of the expectations and circumstances of the particular community. On the other hand, the judge's involvement may, in some cases, jeopardize the perception of impartiality or lead to an undue number of recusals. If this is the case, the judge should (unless the principle of necessity, discussed in section E.17, is implicated) avoid the activity.

³⁰ See chapter 4, "Diligence" and chapter 5, "Equality."

³¹ *Livre* at 17.

C.4 The *Code of Conduct for United States Judges* applicable to the federally appointed judiciary in the United States, while not completely appropriate for Canadian adoption, provides a useful starting point:

Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

- (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.
- (2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but the judge may be listed as an officer, director, or trustee of such an organization. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.
- (3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C.5 These provisions seek to strike a reasonable balance between community involvement and the preservation of judicial impartiality and, although not specifically adopted in these Principles, nonetheless may provide helpful guidance.

C.6 Subject to the discussion that follows, judges are at liberty to be members and directors of civic and charitable organizations and, of course, to exercise

freedom of religion. In general, however, a judge should not allow the prestige of judicial office to be used in aid of fund raising for particular causes, however worthy. This principle suggests that judges (apart from requests to judicial colleagues) should not personally solicit funds or lend their names to financial campaigns. *Commentaries on Judicial Conduct* notes that when a judge is directly involved in fund raising there may be a temptation for lawyers or litigants who are canvassed to try to curry favour with the judge by contributing. Moreover, such solicitation identifies the judge with the objects of the organization.³² However, the simple appearance of the judge's name as a director (or similar position) on the organization's general letterhead is not inappropriate.

C.7 Judges must carefully assess whether to serve on Boards of Directors of organizations other than those serving the professional or educational requirements of judges. It is inappropriate (and prohibited) for a judge to serve on the Board of Directors of a commercial enterprise.³³

C.8 What is the position with respect to volunteer service on boards of community, charitable, religious or educational organizations? Many institutions solicit and/or receive money from government. Except for funds required for the proper administration of justice, it is not appropriate for the judge to be directly involved in soliciting funds from government. Boards of Directors are responsible for the conduct of the organization. The organization may become involved in disputes with staff or others, sue or be sued, breach government regulations of all sorts or otherwise be implicated in matters of public controversy. Any of these situations could be embarrassing for the judge or his or her colleagues and might give rise to reasonable apprehension of a lack of impartiality with respect to certain issues that might arise for judicial consideration. Fellow directors may seek and rely upon the judge's advice on legal matters. But it is inappropriate for the judge to give such advice. The decision to serve must be made after carefully weighing these risks in the particular circumstances.

C.9 Several Canadian judges have served as chancellors of universities or dioceses. Others have served on the boards of schools, hospitals or charitable foundations. Such participation may now present risks that did not appear evident in the past. These risks must be carefully weighed. Universities, churches and charitable and service organizations are now involved in litigation and

³² *Commentaries* at 18-19.

³³ *Judges Act*, R.S.C. 1985, c.J-1, s.55. (See note 12.)

matters of public controversy in ways that were virtually unheard of even in the very recent past. A judge serving as a chancellor of a university or a diocese or as a board member may be placed in an awkward position if the organization should become involved in litigation or matters of public controversy.

C.10 Requests for letters of reference may be difficult for a judge. There are certainly factors a judge will want to consider before agreeing to provide such a letter. One is that the judge should avoid being seen as using the prestige of judicial office to advance a person's private interests. The judge must also avoid giving the impression that certain persons stand in a particular position of influence or favour with the judge. These factors combine to suggest that the judge should agree to give a reference only where it is clear, first, that it is the judge's knowledge of the individual that is called for and not simply the status of the judge and, second, where the judge has an important perspective about the individual to contribute such that it would be unfair to the individual and the selection process were the judge to refuse.

Commentaries reports that a large majority of the judges who responded to the questionnaire leading to the production of that text approved a judge's giving character references. *Commentaries* also noted however that the practices of judges vary and that a number of respondents professed some reluctance.³⁴ While this matter is one on which judges differ, the two part test set out in the preceding paragraph is offered as an approach that strikes an acceptable balance between the desirability of obtaining the benefit of the judge's views while minimizing the risk of undermining the judge's neutrality.

Commentaries states that judges may properly assist judicial appointment advisory committees on a strictly confidential basis. More generally, the commentary on the *ABA Model Code (1990)* addresses the matter as follows:

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may provide a letter or recommendation based on the judge's personal knowledge. A judge also may permit the use of the judge's name as a reference, and respond to a request for a personal recommendation when solicited by a selection of authorities, such as a prospective employer, Judicial Selection Committee or Law School Admissions Office.³⁵

³⁴ *Commentaries* at 33-35.

³⁵ *ABA Model Code (1990)*, Commentary to Canon 2B.

Once again, it is suggested that the two part test proposed for letters of reference generally strikes the right balance in the specific context of judicial appointments even though the result is a somewhat more restrictive approach than that of *ABA Model Code (1990)*.

D. Political Activity

D.1 This section deals with out of court activities of judges. In particular, it addresses political activity and other conduct such as memberships in groups or organizations or participation in public debate and comment which, from the perspective of a reasonable, fair minded and informed person could undermine a judge's impartiality as regards issues that could come before the courts.

D.2 Commentators are unanimous that "all partisan political activity and association must cease absolutely and unequivocally with the assumption of judicial office."³⁶ Two considerations support this rule. Impartiality, actual and perceived, is essential to the exercise of the judicial function. Partisan political activity or out of court statements concerning issues of public controversy by a judge undermine impartiality. They are also likely to lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches on the other. Partisan actions and statements by definition involve a judge in publicly choosing one side of a debate over another. The perception of partiality will be reinforced if, as is almost inevitable, the judge's activities attract criticism and/or rebuttal. This in turn tends to undermine judicial independence.³⁷ In short, a judge who uses the privileged platform of judicial office to enter the political arena puts at risk public confidence in the impartiality and the independence of the judiciary.

D.3 Principles D.3(a) and (b) are widely accepted examples of overt political activity in which judges should not engage after appointment.³⁸ Judges should also consider whether mere attendance at certain public gatherings might reasonably give rise to a perception of ongoing political involvement or

³⁶ *Commentaries* at 9; see also *Livre* at 28; *Shaman* at 360 ff; *Wilson* at 7; Judges in Canada (as in the U.S. and England) are entitled to vote and there is nothing unethical in doing so.

³⁷ *Russell* at 87-88.

³⁸ See e.g. *Wilson* at 7-9; *Thomas* at 156.

reasonably put in question the judge's impartiality on an issue that could come before the court.

D.4 Principle D.3(c) counsels against making contributions to political parties. The rationale of this advice is that the judge should not be identified with the political process or, subject to principle D.3(d), with specific positions on matters of political controversy. The Nova Scotia Judicial Council was confronted with a complaint that a judge had contributed to a political party's fund to alleviate the financial distress of its former leader who was a friend and classmate of the judge. The judge had also contributed to the political campaigns of close relatives and made three other undesignated contributions to the same political party. The Nova Scotia Judicial Council cautioned the judge, reasoning that:

The public perception, we believe, is that where a judge makes a financial contribution to such highly placed political persons, as the three who benefitted from the gifts of this judge, it is impossible to separate them from the political organizations of which they are a part... Since, in our opinion, donations of money are but one way of participating in a political organization, the making of them is deemed to be political activity in which a judge should not engage.³⁹

D.5 The application of Principle D.3(d), which counsels avoidance of public participation in controversial political discussions, is more open to debate and problems of application than the other principles in this section. Judges on appointment do not surrender all of the rights to freedom of expression enjoyed by everyone else in Canada. But, the office of judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of involvement of the judiciary in public debate, there are two fundamental considerations. The first is whether the judge's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attack or be inconsistent with the dignity of judicial office. If either is the case the judge should avoid such involvement.

³⁹ Nova Scotia Judicial Council, *Report Concerning the Conduct of His Honour Paul S. Niedermeyer*, June 17, 1991. (Hereafter "Niedermeyer Ruling.")

D.6 Principle D.3(d) recognizes that, while restraint is the watchword, there are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice, or the personal integrity of the judge. Even with respect to these matters, however, a judge should act with great restraint. Judges must remember that their public comments may be taken as reflective of the views of the judiciary; it is difficult for a judge to express opinions that will be taken as purely personal and not those of the judiciary generally. There are usually alternatives to public discussion. For example, the chief justice of the court may raise the matter formally with the appropriate official or officials. Except for statutory and constitutional duties and matters affecting the operation of the courts or the proper administration of justice, chief justices are in no different position than their colleagues. The Principle suggests a somewhat larger sphere for such interventions than that described in the 1982 comments of the Canadian Judicial Council in the Berger matter. In dealing with that complaint, the Council stated that judges should not speak on controversial political matters that do not directly affect the operation of the courts. The suggestion here is that, having regard to judges' special knowledge and experience in matters relating to the administration of justice and their obligation to preserve judicial independence, the proper ambit for their out of court interventions may be somewhat wider in appropriate cases. Where the terms of reference require, judges serving on Commissions of Inquiry may exercise greater latitude in commenting on issues relevant to the inquiry. Judges serving in this way, however, must continue to bear in mind that they are judges even while serving for the time being as commissioners.

D.7 Nothing in these Principles prevents or indeed discourages judicial participation in law reform or other scholarly or educational activities of a non-partisan nature directed to the improvement of the law and the administration of justice. Judges seconded to law reform commissions may exercise greater latitude with respect to matters under consideration by the Commission. The Commentary to the *ABA Model Code (1990)* indicates that "...[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system and administration of justice... Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession."⁴⁰ However, when engaging in such activities, the

⁴⁰ *ABA Model Code (1990)*, Commentary to Canon 4B.

judge must not be seen as “lobbying” government or as indicating how he or she would rule if particular situations were to come before the judge in court. This, of course, does not prevent judges from making representations to government concerning judicial independence or, through the appropriate mechanisms, with respect to salaries and benefits. Discussion of the law for educational purposes or pointing out weaknesses in the law in appropriate settings is in no way discouraged. For example, in certain special circumstances, judicial commentary on draft legislation may be helpful and appropriate, so long as the judge avoids giving informal interpretations or opinions on constitutionality.⁴¹ Normally, judicial commentary on proposed legislation or on other questions of government policy should relate to practical implications or legislative drafting and should avoid issues of political controversy. In general, such judicial commentary should be made as part of a collective or institutionalized effort by the judiciary, not that of an individual judge.

D.8 Principle D.3(e) suggests that judges should not sign petitions to influence political decisions. Petitions are an example of a situation in which a judge is likely to be perceived as supporting a particular point of view or as lobbying, albeit rather passively, to bring about change. As the Nova Scotia Judicial Council put it, the requirement of complete severance from all political activities means that “a judge shall not try to influence politicians or political issues.”⁴² This is precisely the purpose of petitions.

D.9 The duties of chief justices and, in some cases, those of other judges having administrative responsibilities will lead to contact and interaction with government officials, particularly the attorneys general, the deputy attorneys general and court services officials. This is necessary and appropriate, provided the occasions of such interactions are not partisan in nature and the subjects discussed relate to the administration of justice and the courts and not to individual cases. Judges, including chief justices, should take care that they are not perceived as being advisors to those holding political office or to members of the executive.

⁴¹ The Canadian Judicial Council, for example, struck a special committee which reviewed proposals for a new General Part of the *Criminal Code* and facilitated meetings between senior government officials and judges to discuss child support guidelines.

⁴² *Niedermeyer Ruling* at 12.

E. Conflicts of Interest

E.1 Judges should organize their personal and business affairs to minimize the potential for conflict with their judicial duties. Notwithstanding the judge's best efforts, situations will arise in which the appearance of justice requires the judge to disqualify himself or herself. The issues to be addressed in this section are: (1) what constitutes a conflict of interest? (2) in what circumstances should a judge disclose circumstances which may constitute a conflict of interest? (3) in what circumstances will consent of the parties obviate the need for the judge to be disqualified? and (4) in what circumstances will it be necessary for a judge to preside even though there is an apparent conflict of interest? Each will be addressed in turn.

E.2 What Constitutes a Conflict of Interest?

As Perell puts it, "A common or unifying theme for the various classes of conflicts of interest is the theme of divided loyalties and duties."⁴³ The potential for conflict of interest arises when the personal interest of the judge (or of those close to him or her) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned both with impartiality in fact and impartiality in the perception of a reasonable, fair minded and informed person. In judicial matters, the test for conflict of interest must include both actual conflicts between the judge's self interest and the duty of impartial adjudication and circumstances in which a reasonable fair minded and informed person would reasonably apprehend a conflict.

E.3 A number of texts and commentaries offer guidance to judges on this subject. The Hon. J.O. Wilson in *A Book for Judges*, for example, says a judge's disqualification would be justified by a pecuniary interest in the outcome; a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant.⁴⁴

E.4 The *Code of Civil Procedure* of Quebec is unique in Canada in offering authoritative guidance. The subject of disqualification is expressly addressed in articles 234 and 235. Included among the grounds for disqualification are, for example, the judge being related to one of the parties within the degree of

⁴³ Paul M. Perell, *Conflicts of Interest in the Legal Profession* (1995) at 5.

⁴⁴ Wilson at 23.

first cousin, having acted for one of the parties, having an interest in the outcome, etc.⁴⁵

E.5 As elsewhere in this area, the concern is with reasonable perception, as well as actual conflict of interest. In general, a judge should not preside over a case in which he or she has a financial or property interest that could be affected by its outcome or in which the judge's interest would give rise in a reasonable, fair minded and informed person, to reasoned suspicion that the judge would not act impartially.⁴⁶ This general rule applies whether the interest is itself the subject matter of the controversy or where the outcome of the case could substantially affect the value of any interest or property owned by the judge, the judge's family or close associates. It will not apply where the judge's interest is limited to one shared by citizens generally.

E.6 This broadly formulated rule cannot be strictly applied, however. Owning an insurance policy, having a bank account, using a credit card or owning shares in a corporation through a mutual fund would not, in normal circumstances give rise to conflict or the appearance of conflict unless the outcome of the proceedings before the judge could substantially affect such holdings. Nor should small holdings, such as those contemplated by the *de minimis* provisions of *ABA Model Code (1990)* give rise to any reasonable question concerning the judge's impartiality.⁴⁷ However, if the holding is more substantial, the judge should not sit, subject to considerations of necessity discussed in section E.17.

E.7 Should interests of members of the judge's family, close friends or associates be considered as giving rise to a perception of conflict of interest? As a matter of broad general principle, one can imagine circumstances in which the interests of the judge's family, close friends or associates in matters before the judge could give rise to a reasonable apprehension of conflicting interest and duty. To attempt to define these matters with greater precision, however, is another matter. Article 234(1) and (9) of the *Code of Civil Procedure* define precisely the degree of family relationship with parties or counsel which requires recusal. Article 235 refers to the personal interest of the judge or "his

⁴⁵ *Code of Civil Procedure*, art. 234-235.

⁴⁶ *Shaman* at 136; the language is modelled on that of Rand, J. in *Szilard v. Szasz*, [1965] S.C.R. 3 at 4.

⁴⁷ See note 28; *de minimis* is defined as being "an insignificant interest that could not raise a reasonable question as to the judge's impartiality."

consort” as justifying recusal. *ABA Model Code (1990)* defines the degree of family relationship which should lead to disqualification.⁴⁸

E.8 While these approaches introduce much needed clarity, it may come at the expense of attention to the general principle that a judge (subject to the discussion in section E.17 below) should disqualify him or herself if aware of any interest or relationship which, to a reasonable, fair minded and informed person would give rise to reasoned suspicion of lack of impartiality. For the purposes of national principles of judicial ethics for Canada, the temptation to become more specific than this should be avoided.

E.9 Personal insolvency and bankruptcy give rise to a variety of potential difficulties for judges. Whether, and if so in what circumstances, these difficulties will provide grounds for removal of a judge is not an issue that falls within the range of questions addressed by these Principles. As the *Bankruptcy Act*, section 175, recognizes, bankruptcy may occur by misfortune and without misconduct. For instance, a judge could be held liable for a defalcation of a former law partner or for an accident involving the judge’s vehicle driven by his or her spouse or child. Having regard to this fact, no general rule can, or should be formulated.

E.10 The judge who is in financial difficulty will have to be particularly vigilant for conflicts of interest, both actual and perceived. There will be difficulties in the judge presiding over matters involving any of his or her creditors or, perhaps, other matters raising similar issues. Serious questions arise if any aspect of the judge’s financial difficulties becomes contentious. In this event, the possibility of the judge appearing before a judicial colleague as a party or a witness would arise. The actual day-to-day impact of the financial difficulties on the judge’s ability to perform the job will obviously vary considerably depending on the circumstances and the size of the jurisdiction. Circumstances which might cause very minor inconvenience to a large court might

⁴⁸ See for example, Canon 3E(d):

(d) the judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- (i) is a party to the proceeding, or an officer, director or trustee of a party;
- (ii) is acting as a lawyer in the proceeding;
- (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the outcome of the proceeding;
- (iv) is to the judge’s knowledge likely to be a material witness in the proceeding.

“Third degree of relationship.” The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

nonetheless have a significant practical impact on a smaller court. Once again, however, it seems impossible and unwise to try to deal with the scores of possibilities other than through application of the general principle that, where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge will not be impartial, the judge should not sit. In certain circumstances, the principles relating to diligence might also be relevant if the judge's conflicts were so extensive that they effectively prevented the judge from carrying out his or her duties. A judge's bankruptcy may raise many of these issues in acute form. When judges become aware of financial or other similar circumstances likely to affect public perception of their impartiality, they should draw them to the attention of their chief justices.

E.11 Disclosure

The absence in Canada of a general statutory requirement for financial disclosure does not resolve the ethical question of when a judge should disclose to the parties a matter which might be considered as giving rise to a potential conflict of interest. The position in England and Australia appears to be that the judge should disclose any interest or factor which might suggest that the judge should be disqualified.⁴⁹ This approach, however, is premised on the view that the disclosure is made with a view to seeking the consent of the parties for the judge to hear the case.

E.12 Whether there are circumstances in which the consent of the parties is essential to permit the judge to hear the case is the subject of the next section. However, the issues of disclosure and consent are not necessarily linked. For now, it can be concluded that a judge should disclose on the record anything which might support a plausible argument in favour of disqualification.

E.13 Consent of the Parties

Commentaries on Judicial Conduct acknowledges the practical difficulty of attempting to cure a concern about disqualification by disclosure to and consent of the parties. The main concern is that such an approach puts counsel in an unfair position — as one respondent put it, to either consent or to risk being seen as a trouble maker.⁵⁰

⁴⁹ See for example, *Shetreet* at 305; *Thomas* at 53-55; *Commentaries* at 72; *Wilson* at 30-31.

⁵⁰ *Commentaries* at 74.

E.14 It is not suggested that consent of the parties would justify a judge continuing in a situation in which he or she felt that disqualification was the proper path. The issue of consent, therefore, arises only in those cases in which the judge believes that there is an arguable point about disqualification but in which the judge believes, at the end of the day, a reasonable person would not apprehend a lack of impartiality. Putting the matter this way perhaps highlights the difficult position in which counsel is placed. By disclosing the matter and seeking consent to continue, the judge is in essence saying that no reasonable person should apprehend a lack of impartiality. Therefore, if counsel fails to consent, counsel (or their clients) may appear to be taking an unreasonable position. A partial answer to this concern may be to adopt the English practice in which the judge is told that an objection was made by one of the parties without being told which side objected.⁵¹

E.15 The better approach is for the judge to make the decision without inviting consent, perhaps in consultation with his or her chief justice or other colleague. If the judge concludes that no reasonable, fair minded and informed person, considering the matter, would have a reasoned suspicion of a lack of impartiality, the matter should proceed before the judge. If the conclusion is the opposite, the judge should not sit.

E.16 The judge should make disclosure on the record and invite submissions from the parties in two situations. The first arises if the judge has any doubt about whether there are arguable grounds for disqualification. The second is if an unexpected issue arises shortly before or during a proceeding. The judge's request for submissions should emphasize that it is not counsel's consent that is being sought but assistance on the question of whether arguable grounds exist for disqualification and whether, in the circumstances, the doctrine of necessity applies.

E.17 Necessity

Extraordinary circumstances may require departure from the approaches discussed above. The principle of necessity holds that a judge who would otherwise be disqualified may hear and decide a case where failure to do so could result in an injustice. This might arise where an adjournment or mistrial would work undue hardship or where there is no other judge reasonably available who would not be similarly disqualified.⁵²

⁵¹ See *Shetreet* at 305.

⁵² See, for example, *Wilson* at 29; *Shaman* at 99-101 and *Shetreet* at 304.

E.18 Acting as Executor

There is a range of views as to whether a judge should serve as an executor. Shetreet describes the English practice in which judges may serve as executors of estates of friends or relatives, provided there is no remuneration, the judge is not involved in the day-to-day administration of the estate and the required work does not interfere with his or her judicial duties.⁵³ In the United States, the *ABA Model Code (1990)* deals with this point as follows:

4E. Fiduciary Activities

- (1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.
- (2) A judge shall not serve if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
- (3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.⁵⁴

In Canada, *A Book for Judges, Le livre du magistrat*⁵⁵ and *Commentaries on Judicial Conduct*⁵⁶ agree that, as a general rule, the judge should not act but that it is permissible to do so if the estate is of a relative or close friend and it appears to be simple and not contentious. Should these predictions prove wrong, these authorities all advise the judge to retire from the executorship.

In summary, it is suggested that a sound approach to the question is as follows:

1. As a general rule, a judge should not act as an executor.

⁵³ Shetreet at 331.

⁵⁴ *ABA Model Code (1990)*, Canon 4E.

⁵⁵ *Livre* at 24.

⁵⁶ *Commentaries* at 35-6.

2. It is not improper for a judge to so act if:
 - (a) he or she does so without fee;
 - (b) the estate is of a close friend or relative;
 - (c) it is unlikely to be contentious; and,
 - (d) performance of the obligations will not interfere with judicial duties.
3. Having embarked on the executorship, the judge should retire from it if the estate becomes contentious or if the executorship interferes with the performance of judicial duties.

E.19 Former Clients

Judges will face the issue of whether they should hear cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid office in which the judge practised before appointment. There are three main factors to be considered. First, the judge should not deal with cases concerning which the judge actually has a conflict of interest, for example, as a result of having had confidential information concerning the matter prior to appointment. Second, circumstances must be avoided in which a reasonable, fair minded and informed person would have a reasoned suspicion that the judge is not impartial. Third, the judge should not withdraw unnecessarily as to do so adds to the burden of his or her colleagues and contributes to delay in the courts.

The following are some general guidelines which may be helpful:

- (a) A judge who was in private practice should not sit on any case in which the judge or the judge's former firm was directly involved as either counsel of record or in any other capacity before the judge's appointment.
- (b) Where the judge practised for government or legal aid, guideline (a) cannot be applied strictly. One sensible approach is not to sit on cases commenced in the particular local office prior to the judge's appointment.
- (c) With respect to the judge's former law partners, or associates and former clients, the traditional approach is to use a "cooling off period," often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge and subject to guideline (a) above concerning former clients.

- (d) With respect to friends or relatives who are lawyers, the general rule relating to conflicts of interest applies, i.e., that the judge should not sit where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge would not be impartial.

Related issues, requiring similar approaches, may arise in relation to overtures to the judge while still on the bench for post-judicial employment. Such overtures may come from law firms or prospective employers. There is a risk that the judge's self-interest and duty would appear to conflict in the eyes of a reasonable, fair minded and informed person considering the matter. A judge should examine such overtures in this light. It should also be remembered that the conduct of former judges may affect public perception of the judiciary.

